No. 70-31

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In the Supreme Court of the United States

OCTOBER TERM, 1970

PORT OF PORTLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLEES

On Appeal From the United States District Court for the District of Oregon

BRIEF OF THE INTERSTATE COMMERCE COMMISSION

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INDEX

TABLE OF CITATIONS

Commission cases:

In the Supreme Court of the United States

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No. 903

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BRIEF OF THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The order and judgment of the district court (App. 9-10) is unreported. The report and order of the Interstate Commerce Commission (App. 11-67) is printed at 334 I.C.C. 419.

JURISDICTION

The judgment of the district court was entered on July 9, 1970 (App. 9-10). The notice of appeal was filed on September 1, 1970 (App. 585-588), and the

appeal was docketed on October 26, 1970. Probable jurisdiction was noted on February 22, 1971. 401 U.S. 906 (App. 589). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2325.

QUESTIONS PRESENTED

Peninsula is a small terminal railroad, less than four miles long, in the Portland area. At the present time it serves fourteen industrial sites along the Columbia River. Originally built as a stockyard railroad to serve a packinghouse facility long since closed, Peninsula's operations at first were conducted by the BN and UP, whose main line tracks adjoin and connect with it via some jointly owned interchange tracks.

When Peninsula was offered for sale by its present owner, BN and UP agreed to buy it and requested Commission approval of the acquisition. Largely because of the future potential of a large and basically undeveloped tract of land at one end of Peninsula's line, Rivergate Industrial District, currently being promoted by the Port of Portland, two other railroads —Milwaukee and SP—requested that the Commission require their inclusion as co-owners. In its report and order, the Commission approved the acquisition of Peninsula by BN and UP, but found that the joint and equal ownership by Milwaukee and SP was not required by the public interest.

The principal question before this Court is whether the lower court properly concluded that the Commission's orders approving the acquisition of control of

Peninsula were supported by substantial evidence and were neither arbitrary nor capricious. Embraced within that issue are the following subordinate questions:

1. Whether the Commission reasonably might conclude that the inclusion of Milwaukee and SP as joint and equal owners of Peninsula was not necessary to render the transaction consistent with the public interest.

2. Whether the ownership of Peninsula by BN and UP will in no way impede the entry of Milwaukee into Portland in implementation of Condition No. 24 of the *Northern Lines* decision.[1]

3. Whether Milwaukee and SP are able to compete effectively with BN and UP for the present and potential traffic of Peninsula and Rivergate without the inclusion of Milwaukee and SP in control of Peninsula and the acquisition of the ancillary trackage rights.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1; Section 3(4) of the Interstate Commerce Act, as amended, 49 U.S.C. 3(4); Section 3(5) of the Act, 49 U.S.C. 3(5); and relevant portions

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[1] This question may not be properly before this Court. Rule 40(d)(2). While appellants raise and argue the point (principal brief, pp. 2, 30-31; supplemental brief of Milwaukee, pp. 1-35), no such question was raised and argued in their jurisdictional statement. The Department of Justice, supporting the position of appellants, did raise this issue at the jurisdictional stage (Memorandum for the United States, pp. 4-9).

of Section 5 of the Act, as amended, 49 U.S.C. 5, are set forth in the Appendix, *infra*.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (App. 9-10) sustaining a report and order of the Interstate Commerce Commission (App. 11-67) authorizing, subject to conditions, the joint acquisition by the Burlington Northern (BN)[2] and the Union Pacific Company (UP) of control of the Peninsula Terminal Company (Peninsula). The Commission's order denied the petitions of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) and the Southern Pacific Transportation Company (SP) for inclusion in the transaction as equal co-owners of Peninsula, and granted no trackage rights linking Peninsula with their lines.

A. Description of Peninsula

Peninsula is a small independent terminal switching railroad at North Portland, Oregon, subject to Part I of the Interstate Commerce Act. *Status of*

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[2] The application was originally filed in the name of SP&S, which was formerly owned equally by the Great Northern Railway Company and the Northern Pacific Railroad. SP&S is now a subsidiary of the Burlington Northern (BN), the new company resulting from the merger of the Great Northern and the Northern Pacific approved by the Commission in its *Northern Lines* decision (*Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 and 331 I.C.C. 869) and affirmed by this Court in *Northern Lines Merger Cases*, 396 U.S. 491, and this family of lines will be referred to hereinafter as "BN".

Public Stockyard Companies, 245 I.C.C. 241 (1941). (App. 14-15, 39-40). It presently serves fourteen industries and is owned by the United Stockyards Corporation (*Stockyard Ry. Co. Control*, 254 I.C.C. 207 (1943)), which no longer desires to operate it. (App. 17, 25, 40).

UP and BN, the only two railroads which physically connect with Peninsula, for many years have interchanged with it cars moving to and from industries on Peninsula, in recent years averaging about ten cars a day, by means of the four-track yard referred to as the North Portland interchange. (App. 204, 361). This yard—jointly owned and operated by Peninsula, UP and BN—links Peninsula with those two line-haul railroads and also serves as an interchange point between BN and UP on certain traffic not originating at or destined to shippers on Peninsula.[3] In addition to the interchange operations, BN and UP provided the line haul for approximately 79 percent of Peninsula traffic in 1966 and 82 percent in 1967. By connections and joint rates and through routes, SP shared in about 20 percent of Peninsula's traffic in 1966 and 17 percent in 1967; under similar arrangements Milwaukee's portion of the cars moving to and from industries on Peninsula during those two years was one percent. (App. 31, 281).

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[3] Peninsula owns a one-half interest in two of the four interchange tracks, with the other half owned jointly by UP and BN. The other two tracks are owned jointly by UP and BN. (App. 17, 25, 41-44, 77-80, 82-84, 92-93, 262-267, 273, 346, 353, 368-369).

Present interest in Peninsula results from the fact that its western terminus borders Rivergate, a sizable but presently largely unoccupied tract owned and being developed as an industrial area by the Port of Portland. (App. 14-15, 39). A study prepared for the Port anticipates that at full development Rivergate will generate a large volume of incoming and outgoing traffic, up to 600 cars a day. (App. 57, 207). At the present time Peninsula serves only one industry and several miles separate the western end of its trackage and the five other industries now located in Rivergate, served by other tracks. (App. 15, 32, 63-65, 135, 233, 427-429, 441-442, 477-479, 551-552, 546-548).[4] Accordingly, any service to future Rivergate industries by Peninsula is dependent upon extensions beyond Peninsula's present tracks.[5]

Whether such extension will ever occur is uncertain. Peninsula suffers from certain physical limitations—its track is built upon sand, its clearances are of limited dimensions, and the line is impeded by heavy curvature. (App. 46-47, 76, 250, 269). An alternate route based upon an extension from the BN main line to Rivergate is under consideration. (App. 15, 46-47). To date, the actual route of the

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[4] The one industry in Rivergate served by Peninsula is Crown Zellerbach's pole yard (located on the east, or Columbia River, side of Rivergate). (App. 15, 39, 135, 233).

[5] BN and UP provide direct service to industries in Rivergate by jointly owned tracks extending from UP's Barnes Yard to the southwestern side of Rivergate, which connect there with those of the Port (App. 15, 45, 48, 477-478, 551-552). By agreement the actual switching is performed by UP (App. 343-344).

tracks into Rivergate has not been selected.[6] (App. 269, 282, 544-545).

B. Proceedings Before The Commission

By a joint application filed July 25, 1967, BN and UP sought authority under Section 5(2) of the Act, 49 U.S.C. 5(2), to acquire control of Peninsula through the purchase of its entire capital stock in equal shares (App. 137-161). Thereafter Milwaukee sought inclusion in the transactions for authority to purchase a one-third share in the control and certain assets of Peninsula and, to permit Milwaukee to connect directly with Peninsula, to acquire trackage rights over the four North Portland interchange tracks, mentioned *supra*, which link Peninsula with the main lines of both BN and UP (App. 162-166, 180-183).[7] SP filed an amended petition and two applications seeking inclusion in the transaction under Section 5(2)(d) as an equal joint owner of Peninsula and acquisition of trackage rights over terminal facilities of Peninsula and UP to enable it to connect with Peninsula at North Portland (App. 167-174).

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[6] Should the route selected be an extension of the BN main line track, BN and UP have assured the Port in writing that they would provide joint service similar to that now furnished via Barnes Yard (see n. 5, *supra*) (App. 47, 269).

[7] Milwaukee's petition was subject to the contingency of implementation of the *Northern Lines* decision, *supra*, a condition in which provided for Milwaukee's entry into Portland over the BN main line from Longview Junction and Vancouver, Wash. At the time of the Commission's instant decision, *Northern Lines* was under review by this Court (App. 15-17, 23-24, 41-42, 163-164, 181-182).

After intervention by Crown Zellerbach Corporation (CZ), the Port, and the Public Utility Commissioner, a hearing on all applications and petitions was held on a consolidated record before a Commission examiner in February and March, 1968. In his report (App. 69-135), the examiner recommended joint acquisition of Peninsula by all four carriers and approval of the trackage rights sought by SP and Milwaukee. Upon exceptions, however, Division 3 of the Commission disagreed. (App. 11-67).

The Commission approved the acquisition of control of Peninsula by BN and UP, subject to conditions. (App. 35-36). It found that it would be in the public interest "for control of Peninsula to pass from the non-carrier, which no longer desires it, to carrier auspices", and further found that, on this record, the "most logical owner would be Peninsula's connecting carriers"—BN and UP (App. 25).

As to the petitions of Milwaukee and SP for inclusion,[8] the Commission first held that for several reasons Milwaukee's petition could not be treated as one to implement the provisions of Condition No. 24 of its *Northern Lines* decision, *supra*, providing for the entry of Milwaukee into Portland and that, accordingly, Milwaukee's petition must be considered under the same public interest criteria as that of SP.[9] The

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[8] The Commission considered the contention that it had no jurisdiction to require the inclusion of Milwaukee and SP, and found such contention to be without merit. (App. 25-28).

[9] The Commission noted that should the Northern Lines merger, the legality of which was at that time being litigated in this Court, be consummated, Milwaukee might seek relief

Commission further found that, judged by such standards, the inclusion of Milwaukee and SP would not "constitute a just and reasonable term, condition, or modification of the authority requested", by BN and UP (App. 33), and accordingly denied the petitions for inclusion and accorded no related trackage rights.

Petitions for reconsideration and for a finding that an issue of general transportation importance was involved were denied by orders of the Commission of October 24, 1969 (App. 579-580) and November 21, 1969 (App. 581-582), respectively.

C. The Decision Of The Three-Judge District Court

After the filing by the Port and the Public Utility Commissioner of a complaint and a motion for a temporary restraining order in the court below and at the request of a judge of that court, the Commission, in December 1969, postponed the effective date of its report and order until further order of the Commission (App. 583-584). Additional complaints were filed separately by SP and Milwaukee. In the court below the Department of Justice urged that the Commission's decision be set aside. By order and judgment of July 9, 1970, the district court, finding that the report and orders of the Commission were supported by substantial evidence and were neither arbitrary nor capricious, dismissed the complaints without opinion (App. 9-10).

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in the *Northern Lines* proceeding regarding the relationship, if any, of Condition No. 24 to Peninsula's tracks (App. 29).

SUMMARY OF ARGUMENT

Appellants' arguments are wholly at odds with the rudiments of transportation economics. The thesis that underlies their pleadings is that a railroad needs to be a joint and equal owner of a terminal railroad in order to serve effectively the industries on the latter's lines. But this is contrary to the widespread and time-honored railroad practice in this country.

It is a fundamental of transportation economics that, although a railroad can reach with its own power only those shippers and receivers of freight situated adjacent to its tracks, it can reach no less effectively all other industries served by rail at common points through cooperative arrangements, most often reciprocal switching. Reciprocal switching arrangements exist at virtually every railroad hub in this country, and Portland is no exception. Even the appellants concede in their briefs that the reciprocal switching districts established by the BN and UP embrace North Portland and the Rivergate Industrial District that is the subject of their concern.

The practice of reciprocal switching extends as well to the terminal railroads serving the railroad hubs of the Nation, and it matters not whether such terminal railroads are wholly independent, whether they are jointly and equally owned union railroads, or whether they are owned by some of the trunk line railroads serving the point. Thus, for example, in the Portland area the Portland Traction Company is jointly owned by the UP and SP, and the Portland Terminal Railroad is jointly owned by the BN, UP

and SP. Yet virtually all of the track of both of these terminal railroads, insofar as they lie within the Portland switching districts, are available on a reciprocal switching basis to each of the trunk line railroads serving Portland.

Peninsula is yet another terminal railroad within the Portland switching district, and the record establishes that the SP has participated in movements to and from the industries served by it just as have the BN and UP, its immediate connections. Now that Milwaukee has been afforded entry to Portland and is itself a trunk line railroad reaching that point, it is able to participate fully in the solicitation of traffic to and from the industries served by Peninsula. That the ownership of Peninsula will have changed from the United Stockyards Corporation to BN and UP will in no way impede that opportunity.

1. The Commission has been faithful to its promises to the Milwaukee—and to this Court—to provide for its entry into Portland, as contemplated by Condition 24 attached to its approval of the *Northern Lines Merger*. Milwaukee has secured trackage rights on the BN between its prior terminus, Longview Junction, and Portland, and (although the record necessarily cannot reflect this) its trains now are operating into Portland as far as the Hoyt Street Yards of the BN. While its power or locomotives do not presently operate over all of the track of the BN within the Portland switching district encompassed by Condition 24, there is no doubt as to Milwaukee's right so to operate, and the movement of Milwaukee

cars by the BN to and from the industries on its lines is performed by BN as agent for the Milwaukee or by some other means.

Under this arrangement Milwaukee can and does have access to Peninsula and the industries on its tracks. Milwaukee's separate brief makes clear that it is content with having BN move its cars to and from Peninsula. Its request for inclusion as a joint and equal owner of Peninsula was designed to protect itself against the possibility that BN and UP might seek to obtain trackage rights on the Peninsula or more favorable rate divisions or switching charges. Milwaukee's concern at this point can best be termed speculative and in any event is within the power of the Commission to guard against under the provisions of sections 5(2) and 3(4) of the Interstate Commerce Act.

2. There is no substance to Milwaukee's suggestion, in its brief to this Court, that its access to Peninsula is dependent upon its participation in joint rates with BN and/or UP, joint rates which would require, for example, its surrender of west bound transcontinental traffic at the Twin Cities. Milwaukee's suggestion ignores that under Condition 23 of the Northern Lines Merger eleven additional gateways were opened to the Milwaukee, permitting it effectively to short haul the BN. More importantly, the suggestion offends completely the fact that, as assured by Condition 24 of the *Northern Lines Merger*, Milwaukee now is a single-line carrier to Portland and can publish local rates to and from

Portland—local rates which apply to all industries within the Portland switching district.

3. The contention that joint and equal ownership of Peninsula by Milwaukee and SP is necessary to overcome handicaps in the physical movements of their cars to and from Peninsula is contradicted by the record and speculative at best. Indeed, Milwaukee expressly disclaims having sought inclusion to bring about a change in the physical handling of its freight. The SP, which does seek to operate its power or locomotives over the track of UP all the way to Peninsula, has failed to demonstrate how its operation will overcome the track congestion and improve service in a manner that the UP has failed to accomplish.

4. Finally, appellants ignore that access to a terminal can be had as effectively through reciprocal switching as it can by direct operations. SP, denied trackage rights to operate over the UP, nevertheless effectively reaches the UP terminus with Peninsula under the reciprocal switching arrangements it long has enjoyed.

ARGUMENT

I.

JOINT AND EQUAL OWNERSHIP OF A TERMINAL RAILROAD IS NOT A PREREQUISITE FOR SERVICE TO ITS INDUSTRIES BY A CONNECTING TRUNK-LINE.

The single thread that unites the appellants in their attack upon the lower court's sustaining of the Commission's order is that, unless the Milwaukee

and SP participate with the BN and UP in joint and equal ownership of, Peninsula, they somehow will be denied the opportunity effectively to serve the industries presently and potentially reached by it. Their concern, insubstantial and unsupported by the record, as we shall discuss, is contrary to the economics of railroad transportation.[10]

It is a basic fact of railroad transportation in America that movements of carloads of freight need not be local to the carrier, that is, that the shippers and receivers need not be situated on the lines of one and the same railroad. Indeed, the railroads of this Nation have welded their lines into a single network affording the shipper with a railroad connection on one of them, access to a receiver with a railroad connection on any one of the others.

Invariably the lines of railroad have converged upon the country's population, manufacturing and marketing centers, and the railroads reaching these points have cooperated among themselves by making the terminal of one the terminal of the others as well. Terminals are opened or unified primarily in two ways. One method is reciprocal switching, an arrangement whereby a railroad retains to itself the ownership and right to operate over its lines but accepts from or turns over to the other railroads en-

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[10] See Bigham and Roberts, *Transportation Principles and Problems* (2d Ed. 1952) 525-528; Pegrum, *Transportation Economics and Public Policy* (1968) 583-587; Taff, *Management of Traffic and Physical Distribution* (3d Ed. 1964) 322-327 and Van Metre, *Industrial Traffic Management* (1953) 355-366.

tering the city the cars consigned to or from industries served by the proprietary company. See *Switching Charges and Absorption Thereof at Shreveport, La.*, 339 I.C.C. 65, 70 (1971). The second method is the organization of terminal companies—railroads that serve industries within the city and switch the cars of trunk line railroads connecting with them. Such terminal companies may be independently owned, may be "union railroads" equally and jointly owned by all of the trunk line railroads serving the city or may be owned by only one or some of the trunk line railroads.

To be sure, joint and equal participation of a terminal railroad by the trunk line railroads connecting with it has in some circumstances been ordered by the courts, *United States* v. *St. Louis Terminal*, 224 U.S. 383 (1912), and by the Commission, *St. Louis SW Ry. Co.—Pur.—Alton and S. R.*, 331 I.C.C. 515 (1968). However, to suggest that such joint and equal ownership is requisite to a connecting trunk line railroad's effective service to and from the industries served by it fails to comport with the requirements of the law.[11]

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[11] Moody's *Transportation Manual* and the *Official Guide of the Railways* offer numerous examples of terminal railroads owned by fewer than all of the trunk line railroads with which they connect. For example, at Detroit the Detroit Terminal Railroad Company, owned by the Grand Trunk Western Railroad and the Penn Central Transportation Company, connects with the Chesapeake & Ohio Railway and the Norfolk & Western Railway as well. Similarly, in Washington the Washington Terminal Company, owned by Baltimore & Ohio Railroad Company and the Penn Central Transporta-

It is too well established to permit of doubt that terminal railroads are common carriers within the meaning of the Interstate Commerce Act. *United States* v. *Brooklyn Terminal*, 249 U.S. 296 (1919); *United States* v. *Union Stock Yard*, 226 U.S. 286 (1912). As such, the terminal railroads are obliged to serve equally and without discrimination all who tender it traffic. *Union Pac. R. Co.* v. *United States*, 313 U.S. 450, 451-452, 456-457, 460-461, 464-467 (1941); *United States* v. *Union Stock Yard Co.*, 226 U.S. 286, 299-301, 303-309 (1912); *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 501-505, 520-523, 524-527 (1911).

Peninsula is such a terminal railroad. Organized in 1918 as a stockyard railroad in connection with a packinghouse situated in the North Portland area (App. 263), the operations of its lines were conducted by the BN and UP until 1930 when Peninsula undertook to perform its own operations. (App. 263-264). It presently operates two diesel locomotives to pick up and set out loads (App. 250-251). Connections with the BN and UP are made on a jointly owned interchange track (App. 262, 264-266, 284), and an average of ten carloads of freight are handled between them daily. (App. 204, 361). Peninsula receives a division of the line-haul rates that apply, and these divisions normally are absorbed by the connecting carriers. (App. 254, 258, 285). Peninsula has maintained complete neutrality as be-

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tion Company, connects with Chesapeake & Ohio Railway, the Richmond, Fredericksburg and Potomac Railroad Company and the Southern Railway.

tween its connecting carriers. (App. 255). Following purchase of Peninsula by BN and UP, the present officers and management will continue to operate the railroad (App. 256, 267), and the new owners will continue the policy of neutrality (App. 285, 359).

II.

INCLUSION OF MILWAUKEE WAS NOT REQUIRED TO IMPLEMENT THE NORTHERN LINES DECISION OR TO AFFORD MILWAUKEE ACCESS TO THE INDUSTRIES SERVED BY PENINSULA.

A. Milwaukee Now Serves Portland Pursuant To Condition 24 Of Northern Lines and Connects With Peninsula.

A basic condition of the Commission's approval of the merger of the Great Northern Railway Company, the Northern Pacific Railway Company and their affiliates, including the Spokane, Portland and Seattle Railway Company, was that Milwaukee be made an effectively competitive transcontinental carrier by, among other things, affording it entry to Portland. *Great Northern Pac. & B. Lines, Merger —Great Northern*, 331 I.C.C. 228 (1967), aff'd *Northern Lines Merger Cases*, 396 U.S. 491 (1970). Milwaukee, whose lines had terminated at Longview Junction, Oregon, some 46 miles north of Portland, had resisted the merger proposal, claiming that, unless appropriately conditioned, the creation of the new company would so completely engulf it as to render it unable long to survive. While the proceeding was pending before the Commission, the appli-

cants acceded to Milwaukee's request for conditions, among them Condition No. 2, providing Milwaukee entry into Portland and trackage rights over the lines of the BN between Longview Junction and Portland necessary to effect such entry (App. 332). That requirement reads, in part, as follows:

> 1. To the extent that New Company or SP&S can do so, it will grant to Milwaukee trackage rights over present Northern Pacific and SP&S tracks between Longview Junction, Washington, and Portland, Oregon including all main, second main, passing and industry tracks, and over SP&S tracks in the Line D valuation area in Portland, and the right to construct at its own cost any necessary cross-overs, to enable Milwaukee to operate freight trains, engines, and cars between Longview Junction and the Hoyt Street freight yard of the SP&S in Portland, with the right to handle freight traffic to or from Longview Junction, Portland, and all intermediate points regardless of origin or destination of said traffic.
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> * * * *
>
> 11. To the extent that New Company or SP&S can do so, it will at the request of Milwaukee and in a fair and impartial manner perform at joint facility costs the switching of Milwaukee cars at Kalama, Vancouver, and Portland to or from industries and connecting carriers to the extent such service is performed by New Company or SP&S for itself or any other carrier. [App. 333-335.]

The agreement between the parties was largely incorporated by the Commission as a condition to its approval of the *Northern Lines Merger*. Condition 24 (331 I.C.C. 228, 357; App. 327) provides, in part:

> 24. At the request of the Milwaukee, presented in writing not more than 6 months after date of consummation of the unification authorized herein or not more than 6 months after the effective date of any certificate or order of this Commission.
>
> (a) Permitting that railroad to extend its operations to Portland, Oreg., and to acquire trackage rights over the line of NuCo between Longview Junction, Wash., and Portland, Oreg., NuCo shall grant to the Milwaukee, upon such fair and reasonable terms as the parties may agree or as determined by this Commission in the event of their inability to agree, trackage rights to operate freight trains over NuCo lines between Longview Junction and Portland, including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries. NuCo shall maintain Portland as an open gateway on a reciprocal basis with the Milwaukee to the same extent as with other connecting carriers;

Milwaukee commenced its service to Portland on March 22, 1971. As of that date Milwaukee has been able to render single-line service to Portland from its on-line points in the Midwest and to publish rates reflecting such service. See, *e.g.*, *Corn & Soybeans, Midwest to Pacific Northwest*, 339 I.C.C. 465, 466-

467 (May 12, 1971).[12] By virtue of its trackage rights over the lines of BN, it has operated its own locomotives as far south as the Hoyt Street Yard.

The BN line over which Milwaukee has trackage rights crosses over the tracks of Peninsula at North Portland, and there are jointly owned turnout and interchange tracks affording a connection between the two lines (App. 262, 264, 265-266, 284). As a practical matter, BN has not switched cars to Peninsula from trains operating through on its own main track but has pulled such cars from Vancouver in switch or transfer movements (App. 46).

At the time of the hearings in this case, it was not certain how the Milwaukee cars would be handled by BN after Milwaukee was afforded access to Portland (App. 373-374, 437). The witness for the Milwaukee declared that the best service it could provide to this area would be to set out and pick up cars at North Portland with its road trains; however, if the pattern of operations over the BN track would not permit this, he was certain an efficient

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[12] In *Corn & Soybeans* Milwaukee had originally proposed to establish a new reduced all-rail multiple-car rate on corn and soybeans, in bulk, from points in the Midwest to Longview, Seattle, and Tacoma, Wash., for export, via its lines direct. After March 22, 1971, Milwaukee proposed to extend the application of the proposed rate to Portland as well as the intermediate points (between Longview Junction and Portland) of Kalama and Vancouver, Wash. In addition to finding the Milwaukee's original proposal to be just, reasonable, and otherwise lawful, the Commission also noted that it had voted not to suspend the proposed application of the rate to Portland and the other two involved cities (339 I.C.C. 465, 467, 474). The proposed rates became effective on May 19, 1971. Reconsideration petitions are pending.

means of interchanging the traffic via North Portland could be worked out (App. 331, 529). An alternative would be to have BN transfer the Milwaukee cars from Vancouver to North Portland for handling in the same way that BN cars are handled (App. 376-377). A third means of handling the Milwaukee cars to and from Peninsula would be to have the BN handle the cars between Hoyt Street and North Portland, as provided for in the October 24, 1966, agreement (App. 334-335).

Milwaukee does not need a share in ownership in Peninsula and/or a direct connection with Peninsula to permit it to provide the shippers or receivers on Peninsula the benefits of single-line rates between Portland and its Midwest points. Even now, the record shows SP handles substantial line-haul traffic to or from industries on Peninsula although such movements require both switching by Peninsula and an intermediate movement by either BN or UP between Peninsula and the SP terminus in East Portland. Notwithstanding, SP publishes its rates on carload traffic as if those industries were on its line and absorbs the switching charges subject to receipt of a certain through minimum charge per car and with the exception of certain non-competitive traffic (App. 61, 347-348, 468-469).[13]

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[13] Peninsula is compensated for its switching services performed for the line-haul carriers by a division of the published rate. Although SP and Milwaukee do not presently connect with Peninsula, they, as well as BN and UP, now absorb Peninsula's division, so that no such charge is passed on to the shipper on Peninsula (App, 43, 254, 258-259, 284-285, 347).

Milwaukee does not need and does not want equal and joint ownership in Peninsula in order to operate its power equipment to and from the industries served by it. Its brief clearly and finally removes any doubt on this score, when it says, "Milwaukee never sought to switch cars to Peninsula's industries with its own engines and crews." [14] Its main purpose in seeking joint and equal ownership of Peninsula is to assure it that BN and UP will not use their ownership of Peninsula so as competitively to disadvantage the Milwaukee. Thus at App. 342 the witness for the Milwaukee explained that "[t]he owning companies * * * can obtain trackage rights by mutual agreement over Peninsula so that industries served by Peninsula are on-line industries for them." But what Milwaukee fails to recognize is that Peninsula will remain a separate railroad; the transaction approved by the Commission was for its control and not its merger. See *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261, 265 (1962), sustained, *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19 (E.D. Mich. 1963), aff'd *per curiam*, 375 U.S. 216. BN and UP will be unable to operate their equipment on Peninsula track even if they want to do so unless they secure authorization therefor from the Commission pursuant to section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2) (App. 386) — and the record indicates that it is unlikely that

[14] Supplemental Brief of Milwaukee, at p. 34.

BN and UP will seek to operate Peninsula (App. 366-367).[15]

Secondly, and perhaps more importantly, Milwaukee professes the fear that BN and UP will use their ownership to fix the charges for Peninsula's services, to be absorbed by Milwaukee or paid by the shippers using Milwaukee if not absorbed, in such a way as to disadvantage the Milwaukee in serving the industries reached by Peninsula (App. 342). Here, again, Milwaukee conveniently ignores that Peninsula is a terminal railroad and as such cannot, even if it were so inclined, discriminate in the assessment of charges between connecting lines. See discussion at p. 16, *supra*. Section 3(4) of the Interstate Commerce Act, 49 U.S.C. 3(4), specifically provides that railroads subject to its requirements, such as Peninsula, "shall not discriminate in their rates, fares, and charges between connecting lines." That a terminal railroad cannot assess one connecting carrier a higher charge than another for like switching services is no longer open to question. *Sioux City & N. O. Barge Lines, Inc.* v. *Chicago & N.W. Ry. Co.*, 303 I.C.C. 537; *Federal Barge Lines, Inc.* v. *Alton S. R.*, 303 I.C.C. 669. It seems clear that Peninsula "cannot lawfully interchange traffic with other independent trunk lines under a reciprocal switching arrangement and at the same time refuse to enter into a like arrangement with complainant." *Chicago, Lake Shore &*

[15] The Department of Justice mistakenly assumes that BN and UP upon acquiring control will be able to operate on Peninsula. Brief, pp. 6, 12, 14.

S. B. Ry. Co. v. *Director General*, 58 I.C.C. 647, 654 (1920) aff'd *sub nom.*, *Chicago, I, & L. Ry.* v. *United States*, 270 U.S. 287 (1926).

To the extent the Department's argument of competitive disadvantage to Milwaukee and SP is premised upon the custom of a line-haul carrier passing on switching charges on a shipment moving to or from a noncompetitive point (Brief, at 15), such contention, for all practical purposes, no longer has any relevance to the instant situation. Since December 5, 1969, the single-line rates of all line-haul railroads serving Portland have been applicable to all industries in the general Portland terminal area, including those on Peninsula, as a result of the so-called Presidents' Conference agreement. This agreement, applicable to the entire North Pacific Coast Territory (Oregon, Washington, and Northern Idaho), eliminates non-competitive switching charges by the establishment of a single basis of switching charges on carload traffic at all common points within the Territory and provides for absorption of the switching charges of intermediate carriers by the line-haul carriers.[16] Under that agreement, all industries within the Portland Switching District—which includes both Rivergate and the North Portland area served by Peninsula—are now on a competitive relationship, regardless of whether or not they are directly served by the carrier providing the line-

[16] The agreement is subject to two exceptions. It does not apply when the line-haul minimum revenue is less than $100 a car after absorption or when a participating railroad specifically excludes a certain tariff item (App. 285-286).

haul on a certain movement. (App. 52-53, 285-286, 351-352). And since March 22, 1971, Milwaukee—as a railroad in Portland—is able to participate in this arrangement and thereby normally afford Portland shippers not on its line, such as those on Peninsula, the benefits of its single-line rates without the shippers' payment of a switching charge of an intermediate carrier.

B. Milwaukee Has Published Single-Line Rates Into Portland Pursuant To Condition 24 and Can Absorb The Charges of Peninsula.

Milwaukee would have this Court believe that it is able to connect with Peninsula only upon through routes and joint rates established with BN or UP, requiring the surrender of shipments at gateways assuring the connecting carriers their long haul. Thus, for example, at page 15 of its brief, Milwaukee says that, as a result of the assailed report and orders of the Commission,

> * * * Milwaukee would continue to participate in traffic to or from Peninsula via joint rates with either Union Pacific or SP&S or one of the latter's parent lines via existing junctions. The existing junctions on transcontinental traffic so far as Milwaukee is concerned, would be Twin Cities or Missouri River gateways and, to a limited extent, via Marengo, Washington in connection with Union Pacific, and on Mountain Pacific traffic and north-south traffic, via Marengo, Tacoma and Chehalis, Washington.

Again, at page 28 of its brief, Milwaukee declares that by its decision the Commission has perpetuated

a "rate policy that prevented Milwaukee from being a rate-making line to Portland and discouraged the publication by Milwaukee of joint rates to and through Portland because it was forced to use short haul off-junctions with nothing in the return direction."

There is no basis whatsoever for Milwaukee's assertion that its access to Peninsula is dependent upon its participation in through routes and joint rates with BN or UP, such as would require its surrender of cars at such distant points as the Twin Cities or Tacoma.

Such may have been the handicaps under which Milwaukee had to operate in the past in seeking to serve Portland and points beyond. However, as a result of the *Northern Lines Merger Cases*, these impediments were removed, and it would be a cruel distortion to think that in the assailed report and orders the Commission attached traffic conditions (App. 35-36)[17] so as to deny Milwaukee the protection it had previously been granted.[18]

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[17] The traffic conditions are generally the same as those first prescribed in *Detroit, T. & I. R. Co., Control*, 275 I.C.C. 455, 492 (1950), sustained, *New York, C. & St. L. R. Co.* v. *United States*, 95 F. Supp. 811 (N.D. Ohio 1951).

[18] The traffic conditions imposed by the Commission are another means by which Milwaukee, as a railroad in Portland, can be an effective competitor for Peninsula's traffic without its inclusion and without its direct access to Peninsula. The eight conditions imposed by the Commission obligate Peninsula, SP&S, BN and UP to treat the pertinent traffic of SP and Milwaukee via the present routings and interchanges on a nondiscriminatory basis, vis-a-vis their own Peninsula traffic (App. 35-36, 271-272). Any circumstance which Milwaukee

Milwaukee's assertion, first, ignores the fact that Condition 23 of the *Northern Lines Merger Cases*, 331 I.C.C. at 356-357, as modified at 331 I.C.C. 887, *supra*, opened to it the junctions and gateways at Linton and Fargo, North Dakota; Miles City, Judith Gap, Great Falls, Bozeman, Butte and Missoula, Montana; and Spokane, Seattle and Tacoma, Washington. Milwaukee and BN, in response to this condition, have published through routes and joint rates via these points; and Milwaukee presently is operating via these junctions, effectively short hauling the BN. Thus, even if it were true that Milwaukee's access to the Peninsula industries obliged it to participate in through routes and joint rates with the owning roads, it would not be denied the long-haul movements and the revenues earned therefrom as it maintains.[19]

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regarded as a violation of these conditions by Peninsula and/or the carriers controlling it would be subject to complaint before the Commission. Moreover, inasmuch as the effective date of the Commission's order has been postponed pending completion of this litigation, the "present routings and interchanges" referred to in the conditions arguably also may cover any routings and interchanges established by Milwaukee for the handling of Peninsula's traffic since its entry into Portland.

[19] This Court's decision in *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States*, 366 U.S. 745, is not to the contrary. The conclusion that a railroad under the control of other railroads cannot, in the absence of certain findings, be compelled to enter into a through route and joint rate arrangement which would have the effect of short-hauling its parent lines seems to be limited to line-haul operations, and has no application to the type of switching operations performed by Peninsula. Moreover, the general standards governing the relationships of competing railroads have been superseded, in the case of Milwaukee, both by the conditions

Far more significant, however, is the fact that Milwaukee has published single-line rates to Portland; Condition 24 in the *Northern Lines Merger Cases* assured it of the right to do so. And when, beginning March 22, 1971, Milwaukee undertook to operate its trains to and from Portland, under the trackage rights obtained from BN as a condition to the merger, Milwaukee became a ratemaking transcontinental railroad, as the Commission assured it it would be. Since that date it has had in effect single-line rates to and from Portland, and in no way is Milwaukee any longer dependent upon the successful negotiation of through routes and joint rates with BN or UP in order to reach Portland on transcontinental or coastal traffic.[19a]

In the final analysis the present controversy, as far as Milwaukee is concerned, involves no more than whether the movement of its cars to the interchange tracks affording access to Peninsula shall be upon the switching charges as published in the applicable tariffs or upon contract charges negotiated with BN. There is no controversy that Milwaukee's cars can be switched to and from the interchange tracks affording access to Peninsula and the industries beyond, and the owning roads, BN and UP, concede that Milwaukee would be entitled to have this switching performed

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imposed in *Northern Lines* and, with specific regard to Peninsula, by the conditions imposed in the instant case regarding the non-discriminatory treatment by BN and UP of Milwaukee traffic.

[19a] See Milwaukee ad, *The Wall Street Journal*, June 21, 1971, p. 5.

under the normal tariff switching charge—at the time of the hearing six cents per 100 pounds. (App. 439).[20]

Moreover, a persuasive argument can be made that under Condition 24 of the *Northern Lines Merger Cases* Milwaukee is entitled to trackage rights upon the main lines of the BN and as much of the spur tracks extending from them as may be necessary to permit an interchange with connecting railroads. Insofar as Milwaukee elected to have BN perform the movements to and from Peninsula for it, as its agent, the joint-facility contract charge to Milwaukee would be something less than the normal tariff switching charge.

As far as the Commission is concerned the question of the compensation to be paid BN for the movement of Milwaukee cars to and from the interchange track affording the connection with Peninsula remains open. Nothing in the report and orders of the Commission gives comfort to the contention of the owning roads that, since Milwaukee can operate on none of the jointly owned interchange tracks, they have no alternative but to assess the tariff switching charge. On the other hand, neither is there anything in the Commission's report and orders that declares that Milwaukee has the right to operate its trains onto the interchange track and that, therefore, the rendition

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[20] The record indicated that if Milwaukee became a carrier in Portland, it would absorb whatever charges were necessary to make it competitive with the other line-haul carriers operating in that city (App. 528, 531-532). As seen, Milwaukee has in the past, even as a carrier not in Portland, absorbed Peninsula's division (n. 13, *supra*).

of service by BN in its stead can be upon the negotiated contract charges.

If Milwaukee should find itself unable successfully to negotiate with BN and UP to have its cars moved from and to the interchange tracks upon the contract charges—an effort that Milwaukee has not yet fully pursued—and if, moreover, Milwaukee's absorption of the switching charges, as well as of the division that it, as any other railroad, is required to pay Peninsula (App. 439), should prove so burdensome as to preclude its effective participation in the handling of traffic to and from Peninsula and the industries beyond, the Commission provided the vehicle for relief. Condition 8 of its approval of Peninsula acquisition by BN and UP (App. 36) provides:

> Any party or person having an interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

Such a reservation of jurisdiction was an obviously appropriate exercise of the Commission's power to impose conditions implementing the criteria of section 5(2)(d) of the Interstate Commerce Act as to the public interest in the inclusion of a railroad in a considered acquisition of control. Such conditions have been imposed by the Commission for at least forty years. *Alton R. Co. Acquisition and Stock Issue*, 175 I.C.C. 301, 313 (1931); *Union Pacific R. Co. Unification*, 189 I.C.C. 357, 363-364 (1933). And even in the

absence of the express reservation of jurisdiction to reopen the proceeding, the Commission would have enjoyed the power to modify the terms of its report and orders as may be necessary to afford Milwaukee effective and competitive access to the industries served by Peninsula, under the explicit statutory authority of section 5(9) of the Interstate Commerce Act. *City of New Orleans* v. *Texas & N.O. Ry.*, 195 F.2d 882, 886 (5th Cir. 1952); *City of New Orleans* v. *Texas & Pac. R. Co.*, 195 F.2d 887, 889 (5th Cir. 1952).

III.

NO SERVICE IMPROVEMENTS WOULD RESULT FROM AFFORDING MILWAUKEE AND SP JOINT AND EQUAL OWNERSHIP WITH ATTENDANT TRACKAGE RIGHTS.

The Department of Justice supports the appeal of the Milwaukee for the reason, among others, that its access to Peninsula and the industries beyond through switching arrangements with BN is subjected to "severe operational delays that impair both its service and competitive abilities." [21]

The Milwaukee, however, before this Court voices no such complaint, and the contentions advanced in this regard on behalf of the Milwaukee by the Department of Justice are not made by the Milwaukee itself. On the contrary, as we previously pointed out, Milwaukee specifically disclaimed any desire to operate its trains directly into Peninsula, stating: "Milwaukee never sought to switch cars to Peninsula in-

[21] Brief of the United States at p. 16.

dustries with its own engines and crews."[22] Milwaukee is perfectly content to have BN switch its cars, preferably from Vancouver or alternatively from Hoyt Street Yard.

Indeed neither Milwaukee nor any shipper served by Milwaukee offers any complaints as to the switching service performed by BN of Milwaukee cars to and from Peninsula. Neither Milwaukee nor any shipper served by it premised its inclusion as a joint and equal owner of Peninsula on the expectation that service thereby would be improved. The Department is wholly in error in contending that Milwaukee "can reach Peninsula only through a connection at the Guild's Lake Yard,"[23] which some witnesses estimated would require a backhaul and a 24-hour delay. (App. 213, 331). The record establishes—and BN agrees—that there is no reason why the Milwaukee cars cannot be handled by BN in a transfer movement from Vancouver, which would occasion no backhaul at all (App. 377); and possibly, upon further negotiation, Milwaukee's cars could be set out at East St. Johns, about a mile from the interchange tracks leading to Peninsula. (App. 391).

As for the SP, which did profess a desire to operate its trains directly to the Peninsula industries by trackage rights over the UP, there is ample evidence of record that such operations would be impractical (App. 269). The line that runs between the Albina

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[22] Supplemental Brief of Milwaukee at p. 34; see also statements at pages 18, 26.

[23] Brief of the United States at p. 16.

Yard, to which the SP now operates under an arrangement with UP, and the interchange track at North Portland is a single track (App. 402). At its northern end it runs through a mile-long tunnel which must be kept clear lest gaseous conditions develop (App. 569). There already are some forty to fifty trains operating on this single track each day, and to permit the SP to operate over it, as it seeks to do, would add to the congestion that already exists (App. 277, 397, 404).

The Albina Yard, a large yard having more than forty tracks, already is used to capacity (App. 277, 401). All of the tracks are used for yard classification movements, and to attempt to open a through track for the operation of SP trains would disrupt the yard functions (App. 423-424). Southern Pacific's proposal, ostensibly based on its dissatisfaction with the thirty hours or so now consumed in getting its cars to and from Peninsula (App. 398), does not take into account that its cars as tendered to UP at Albina are not presorted (App. 504), and must be switched, inspected, tested, and otherwise processed for handling to their several destinations (App. 420-421). Neither does the Southern Pacific proposal take into account the delays occasioned by the operation of switch engines performing the many movements in the area (App. 566, 568). In short, Southern Pacific's operations over the UP track would add further congestion, would be uneconomical and wasteful, and ultimately would be of no benefit to the public (App. 269-270, 570).

Indeed, there have been few, if any, complaints by the shippers of the SP arising from the switching performed for it by the UP on movements to and from Peninsula (App. 571, 574).[24] The largest of the shippers, Crown Zellerbach, has made allowances for the present operating schedules and has accommodated itself to them (App. 449). Although it supported SP in its effort to secure joint and equal ownership of Peninsula and related trackage rights (App. 302), its support was premised largely upon a desire to secure more special purpose cars (App. 302, 444, 454) —a goal that the Commission found (App. 32) would not be furthered by four-way control.[25] It also sees in its support of the applications a possible means for effecting the rebuilding of the line of Peninsula as

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[24] To show the purported delay in the handling by UP and BN of SP's cars between that carrier's Brooklyn yard in East Portland and Peninsula, SP relied in part on a random ten percent sample of shipments (App. 6, Vol. IV, Tr. 521, 549; App. 315, 317, 521). In view of the adequate explanation of several of the items by a UP witness (UP handled the great majority of the involved movements) (App. 571-576) and the failure by SP to link these movements with complaints by specific shippers (App. 6, Vol. IV, Tr. 520-524; App. 514-515), SP's exhibit did not establish the inadequacy of the handling of that carrier's Peninsula traffic by UP and BN.

[25] SP's witness testified that he did not believe that direct access to Peninsula by SP would increase its ability to furnish empty cars (App. 508) and Milwaukee's witness acknowledged that, when it became a carrier in Portland, its car supply would be available for a shipper on Peninsula, regardless of whether Milwaukee operated its own trains on the North Portland interchange or contracted with the owning lines for the handling of Milwaukee's Peninsula traffic (App. 529).

would be necessary to its use of larger 85-foot cars (App. 454), although the Commission found that four-way control would not result in "any greater likelihood of track realignment". (App. 31-32).

The three shippers located on Peninsula who supported the UP and BN application had no complaints concerning the handling by those lines of cars moving to or from Peninsula (App. 291-292, 474-476; 292-293, 494-497; 294, 484-494). Moreover, a UP witness stated that if Peninsula is the alternative chosen to serve Rivergate, and if Rivergate developed to the extent projected by the testimony of the Port, UP would furnish service as needed (App. 574).[26]

Two other shippers, Oregon Steel Mills and Collier Carbon & Chemical Corporation, were, at the time of the hearing, both in the process of constructing facilities on the Willamette River side of Rivergate, some three or four miles from Peninsula's western terminus. When completed, both companies will be served by UP and BN through the trackage from UP's Barnes Yard. (App. 233, 428-429, 479). While the witnesses for both companies expressed a desire for single-line SP service, this could only occur if the projected tracks beyond the Peninsula tracks are in fact extended so as to reach their sites.

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[26] A witness for the Portland Commission of Public Docks, while favoring four-railroad ownership of Peninsula (App. 246), indicated that UP, which performed the switching at the Commission's Terminal Number 4 in Portland [located to the southeast of Rivergate (App. 233)], had performed "* * * a yeoman job, often going far out of its way to help us when the need arose." (App. 246-247).

The testimony of these shippers underscores the very tenuous and speculative basis of the appeal of the public appellants. Their case, in the final analysis is premised upon two assumptions: first, that the Rivergate area will be developed as the significant source of railroad traffic that they envisaged; and, second, that Peninsula will be selected as the connection for railroad service to and from the area. As previously discussed, it is far from certain that either of these assumptions will ever materialize.

In sum, no service improvements would necessarily result from inclusion of SP or Milwaukee as co-owners of Peninsula. Milwaukee does not even claim any such improvements, and the hopes of the SP witnesses are predicated upon the assumption that Peninsula's tracks will ultimately be extended into Rivergate. Clearly such insubstantial and speculative testimony afforded no basis for requiring inclusion.

IV.

VARIOUS OTHER CONTENTIONS ARE WITHOUT MERIT.

A. The Commission Gave Full Consideration To The Evidence Concerning Rivergate.

Contrary to appellants' repeated assertions, the Commission by no means "ignored" the evidence concerning the present and potential future traffic of Rivergate which, under one alternative, Peninsula might some day handle. Rather, the evidence adduced both by potential shippers and the public agencies sponsoring the Rivergate development was considered by the Commission in some detail. (App. 21, 23, 30-

33, 57-61), and its ultimate decision denying the inclusion petitions of Milwaukee and SP was based upon an evaluation both of present Rivergate traffic and the future potential.

We suggest that appellants' real quarrel is with the Commission's evaluation of the Rivergate evidence—a matter which this Court has repeatedly emphasized is for the judgment of the agency rather than a reviewing court. *Illinois Central R. Co.* v. *Norfolk & Western R. Co.*, 385 U.S. 57, 66, 69 (1966); *Assigned Car Cases*, 274 U.S. 564, 580-581 (1927). And the Commission's conclusion that the evidence as to Rivergate did not justify the inclusion of two additional carriers in control of Peninsula was entirely rational and well within its discretion.

At the time of the proceedings before the Commission, Rivergate—a logogram for a tract of marsh land in the North Portland area at the confluence of the Columbia and Willamette Rivers—was in the initial stages of development (App. 199, 218, 229). With little or no railroad track, with little or no roads, with little or no port facilities, only about 10 percent of the acreage was usable, and the remainder required extensive fill and other work, extending to 15 or 20 years, if the area's potential was to be realized. (App. 199-200, 510-511, 543).

Rivergate held only five industries (App. 200). Four of these, situated at the southwestern part of the property along the Willamette River, were reached by track of the Port of Portland which connected with the line built jointly by the BN and UP. (App. 380). Within the Rivergate area, only the Crown Zellerbach

pole yard at the northeastern edge of the property is within reach of Peninsula's tracks. And since the close of the record in 1968, only three additional industries have located on Rivergate—all on the Willamette River side of the development, beyond reach of Peninsula's tracks.

It is far from certain that Rivergate will ever become the major industrial development the public appellants hope to achieve. And even if their hopes are realized, it is highly uncertain that the necessary rail lines will be built as an extension of Peninsula's trackage. As previously noted, Peninsula suffers physical limitations that impede its utilization to serve the needs of the Rivergate area operating at its maximum potential. Its track is built upon sand, its clearances are of limited dimensions, and the line is impeded by heavy curvature. (App. 250, 269). The operation on its track of unit trains, essential to the development of Rivergate (App. 209), would require the realignment of Peninsula trackage (App. 537-539). Finally, the public support for inclusion is premised upon the owners' operation in their own right on the Peninsula tracks (App. 215), a premise that the appellant, Milwaukee, itself does not support.

As previously discussed, the northeastern end of Rivergate along the Columbia River may ultimately be served, not by Peninsula at all, but by a new line extending from the main line of the BN. (App. 269, 538, 544). BN and UP have given the Port of Portland written assurances that if and when such line is constructed they will render joint services similar to that which they already are providing on the

southeastern shore along the Willamette River. (App. 295-299, 388-389).

In this state of the record, four-way control of Peninsula plainly was not required solely upon the speculation that Peninsula might some day be extended to serve an area which might some day be heavily developed. This is particularly so since, as previously demonstrated, any industries ultimately reached by Peninsula can readily be served by both Milwaukee and SP, without regard to their participation as co-owners in Peninsula. Thus the Commission's decision was based upon full consideration of the evidence as to Rivergate, and can in no way impede its future growth and development.

B. The Commission Properly Gave Weight To The Historic Presence of BN and UP in the Peninsula—Rivergate Territory.

There is no basis for appellants' attack upon the Commission's conclusion that the Peninsula-Rivergate area has historically been the "territory" of BN and UP, thus bolstering the propriety of their accession to control of Peninsula. Even before Rivergate was developed and BN and UP undertook to meet its transportation requirements (App. 382), these two railroads were committed to the development and service of this area. Prior to Peninsula's formation in 1918, BN and UP themselves performed the necessary switching function for industries in the area. From 1918 until 1930 (when Peninsula became independent), BN and UP performed the switching operations under lease from Peninsula,

and thereafter Peninsula performed its own operations. (App. 263-264). During all this time, BN and UP have performed the interchange for all of Peninsula's traffic and, additionally, have performed the line-haul operation on the vast bulk of Peninsula's traffic.

Adjacent to the Rivergate area is a large marine terminal operated by the Commission of Public Docks, Terminal No. 4 (App. 247). BN and UP had rendered service to that facility since 1921 (App. 381). Their service, handled by UP under contract, was applauded by Witness Mowat representing the Commission; he said that the UP had "done a yeoman job, often going far out of their way to help us when the need arose." (App. 247).

It was in the light of the record recitation of the historical interest of the BN and UP in the development of the entire North Portland area, including Terminal No. 4, the industries reached by Peninsula and, indeed, Rivergate, that the Commission concluded that to accord Milwaukee and SP joint and equal ownership of Peninsula and related trackage rights "would constitute a new operation and an invasion of the joint applicant's territory" (App. 30).[27]

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[27] Appellants attempt to take out of context and elevate beyond all due proportion the Commission's observation that were the entire Portland territory treated as a single industrial area, this would provide "grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads." (App. 30). Obviously such efforts would remain within the control of the Commission, which would have to approve or disapprove whatever applications might be filed. But the rationale under-

Since the grant of the Milwaukee's and SP's applications would not result in demonstrable service improvements and, on the contrary, would operate to the disadvantage of BN and UP, which developed this area, the Commission concluded on balance that their applications for inclusion should be denied. That there is a rational basis for the conclusion of the Commission can scarcely be doubted.

C. No Need For Affording Milwaukee And SP Direct Entry Into The Peninsula Terminal Facilities Was Demonstrated.

Alternative to their bid for inclusion under section 5(2) of the Interstate Commerce Act, Milwaukee and SP seek the right to operate to and from Peninsula, on the theory that this is no more than affording them direct access to terminal facilities within the meaning of section 3(5) of the Interstate Commerce Act, 49 U.S.C. 3(5). As we have previously indicated, North Portland heretofore had not been served by Milwaukee and SP, and, accordingly, as the Commission reasoned (App. 34), they had no right of access to the North Portland terminal facilities of BN and UP.

However, Milwaukee and SP misconceive the purport of section 3(5) in suggesting that they do not

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lying such applications would be indistinguishable from that advanced here, and the Commission's concern for the "problems and litigation" attendant upon such applications, with consequent "disrupt[ion] of growth and development of the area" (App. 30), is plainly not unreasonable. This affords an additional reason for the weight given to the historical presence of BN and UP in the Penninsula-Rivergate area.

have the use of terminal facilities in the absence of obtaining the right physically to operate their power equipment upon such tracks. As we have sought to develop fully at the outset of our argument, it is axiomatic in railroading that effective service can be rendered through reciprocal switching no less than through direct service. That Milwaukee and SP can reach Peninsula and the industries beyond through the switching services offered them by BN and UP is peradventure clear. At best Milwaukee professes some concern about the charge to be assessed it for this service; SP, on the other hand, maintains that its operation of through trains somehow will avoid the congestion and resultant delays that UP's services have encountered.

Section 3(5) and the opportunity it affords to a railroad to obtain access to the terminal facility of another railroad heretofore has been satisfied by opening such terminal facilities by requiring switching arrangements in lieu of permitting physical operations. *Port Arthur Chambers of Commerce* v. *T. & F.S. Ry. Co.*, 136 I.C.C. 597 (1928), 73 I.C.C. 361, 364 (1922); *Hastings Commercial Club* v. *C., M. & St. P. Ry. Co.*, 107 I.C.C. 208, 216 (1926), 69 I.C.C. 489 (1922). Under section 3(5) the Commission is empowered to order one carrier to perform terminal switching services for another. *Chicago & N.W. Ry. Co.* v. *Ann Arbor R. Co.*, 263 I.C.C. 287, 295-296 (1945).

Insofar as physical operation of power equipment is concerned, the Commission properly noted that the Peninsula-Rivergate area has historically been the

territory of BN and UP (App. 34), so that SP has no existing right to serve that territory with its own power. In this circumstance, SP would not be entitled to construct terminal facilities of its own to serve the area, and there was thus "no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests." (App. 34). Since the requested grant of trackage rights would not serve the purpose of "avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory" (App. 34)—one of the basic purposes for which Section 3(5) was enacted—and since there was no need by the shipping public that SP be afforded direct access, with its own power, to Peninsula, the Commission properly found "no ground for authorizing the requested common use". (App. 34).

Finally, we note that before the Commission can order the use by one carrier of the terminal facilities of another, it must find that "such use would be in the public interest, would be practicable, and would not substantially impair the ability of the carrier owning or entitled to the enjoyment of the facilities to handle its own business." *Jamestown, N.Y., C. of C.* v. *Jamestown, W. & N.W. R. Co.*, 195 I.C.C. 289, 292 (1933). See also, *Southern Pac. Co.* v. *A., T. & S.F. Ry. Co.*, 188 I.C.C. 557, 559 (1932). Although the Commission stated that it "need not reach the questions of whether common use of the facilities involved would be practicable or would sub-

stantially impair the ability of Peninsula and UP to handle their own business" (App. 34), the Commission's discussion in its report leaves no doubt that it was mindful of the adverse effect of the proposed Milwaukee and SP operations upon BN and UP without any real benefits accruing to their shippers or the public generally (App. 31-33). Under the circumstances, the Commission could reasonably conclude, as it did, that the section 3(5) relief sought by the Milwaukee and SP had not been shown to be necessary.

D. The Commission Gave Appropriate Consideration To The Competitive Effects Of The Transaction.

In urging that the Commission failed to give appropriate consideration to the competitive consequences of its approval of the control of Peninsula by BN and UP, without the inclusion of Milwaukee and SP, the Department is simply raising again the arguments consistently rejected by this Court in cases extending from *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) to *Northern Lines Merger Cases, supra.* Only last Term in *Northern Lines*, this Court reiterated that the promotion of competition, though a consideration, is only one factor in a Section 5 proceeding (396 U.S. at 513-514). And it is equally well settled that the task of balancing the competitive consequences of a transaction against the various other factors is a matter for the judgment and discretion of the Commission. *McLean Trucking Co.* v. *United States, supra.* This is particularly true where, as here, rival applicants seek

to control another railroad. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 187-189 (1959).

Here the Commission concluded that any advantage of four-way control of Peninsula would be outweighed by the adverse effect upon BN and UP—the carriers that have historically served the area—and the shippers dependent upon them for service. This, as the Commission found, "would be directly contrary to . . , the national transportation policy, to foster sound economic conditions in the transportation industry." (App. 33).

Contrary to the Department's assertions, the mere fact that BN and UP are financially strong carriers does not, *ipso facto*, justify the inclusion of two additional carriers in a transaction involving territory historically served by BN and UP. Application of the concept of territorial protection has never been limited to the protection of financially weak carriers providing adequate service. *Cf., e.g., Braswell Freight Lines, Inc.—Purchase—Shayler*, 101 M.C.C. 1, 17, sustained in *Braswell Motor Freight Lines, Inc.* v. *United States*, 275 F. Supp. 98, 102-03 (W.D. Tex. 1967), *aff'd per curiam*, 389 U.S. 569, *reh. den'd.*, 390 U.S. 975; *Motor Common Carriers of Property —Routes and Service*, 88 M.C.C. 415, 424-25.

In sum, the Commission fulfilled its duty to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed" control (*McLean Trucking Co.* v. *United States, supra*, 321 U.S. at 87). Its conclusion that the transaction did not require the inclusion of Mil-

waukee and SP was a judgment well within its discretion.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1, is as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(4) of the Interstate Commerce Act, 49 U.S.C. 3(4), provides as follows:

> All carriers subject to the provisions of this part shall, according to their respective powers,

afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Section 3(5) of the Act, 49 U.S.C. 3(5), provides as follows:

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the

use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 5(2) of the Act, 49 U.S.C. 5(2) provides as follows in pertinent part:

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of

another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed

transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding of such inclusion is consistent with the public interest.

* * * * *

Section 5(9) of the Act, 49 U.S.C. 5(9), provides as follows:

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

* * * * *

Section 5(11) of the Act, 49 U.S.C. 5(11), provides as follows:

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or fran-

chises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

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